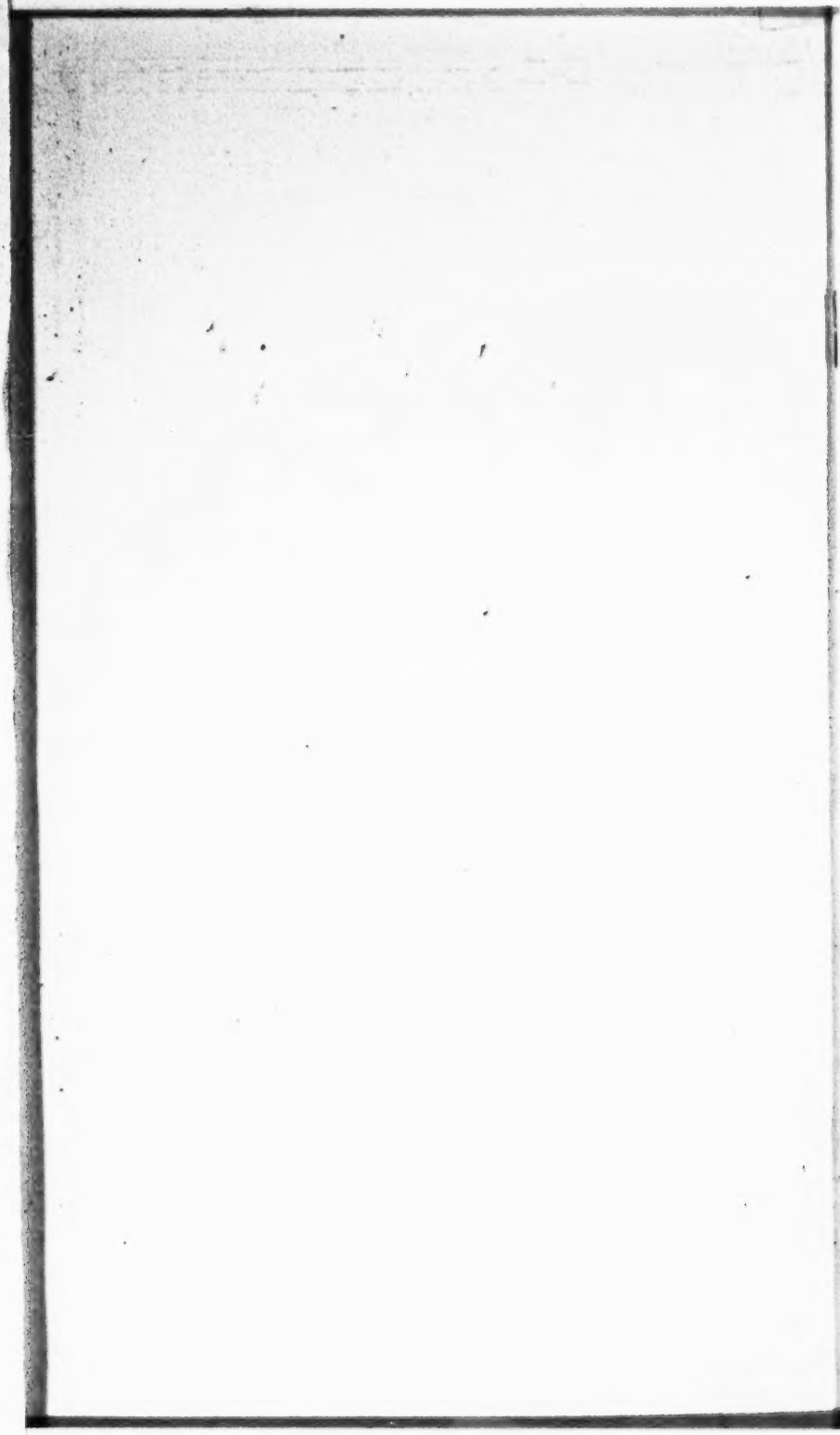

Supreme Court, U. S.
FILED
OCT 5 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

DOCKET NO. 73 446

SLEGERS-FORBES, INC., a New Jersey Corporation, and MALCOLM S. FORBES,

Petitioners,

vs.

NEW JERSEY HIGHWAY AUTHORITY, A Body Politic and Corporate, GARDEN STATE PARKWAY, and JOHN B. GALLAGHER, Director,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM T. HIERING,
Attorney for Respondents,

Court House Square,
Toms River, New Jersey 08753

N. J. Appellate Printing Co., Inc., Woodbridge, N. J. (201) 636-2030
Call Toll Free (800) 572-2657

TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Denying the Writ 3

POINT I: The New Jersey Highway Authority regulation under attack is a valid exercise of that body's administrative powers and complies with the due process requirements of the Fourteenth Amendment of the United States Constitution 3

POINT II: The New Jersey Highway Authority's regulation banning motorcycle operation on the Garden State Parkway complies with the equal protection clause of the Fourteenth Amendment of the United States Constitution 6

Conclusion 11

CASES CITED:

Baxstrom v. Herold,
383 U.S. 107, 86 S. Ct. 760, 15 L.Ed2d 620 (1966) 7

Bi-Metallic Investment Co. v. State Board,
239 U.S. 441, 36 S. Ct. 141, 60 L.Ed.2d 372 (1915) 5

Borden's Farm Products Co. v. Ten Eyck,
297 U.S. 251, 56 S. Ct. 453, 80 L.Ed. 669 (1936) .. 7

Hynes v. Grimes Packing Co.,
337 U.S. 86, 69 S. Ct. 968, 93 L.Ed. 1231 (1949) .. 3

Pacific States Box and Basket Co. v. White,
296 U.S. 176, 59 S. Ct. 159, 80 L.Ed. 138 (1935) .. 4

TABLE OF CONTENTS

Page

CASES CITED:

Radice v. People of State of New York,
264 U.S. 292, 44 S. Ct. 325, 68 L.Ed. 690 (1924) .. 7

Railway Express, Inc. v. State of New York,
336 U.S. 106, 69 S. Ct. 463, 93 L.Ed. 533 (1949) .. 9

South Carolina State Highway Dept. v. Barnwell Bros.,
303 U.S. 177, 58 S. Ct. 510, 82 L.Ed. 734 (1938) .. 8

Sproles v. Binford,
286 U.S. 374, 52 S. Ct. 581, 76 L.Ed. 1167 (1931) .. 8

State v. Krammes,
105 N.J. Super. 345 (App. Div. 1969) 9

State v. Mele,
103 N.J. Super. 353 (Cty. Ct. 1968) 9

State of Louisiana ex rel. Francis v. Resweber,
329 U.S. 459, 67 S. Ct. 374, 91 L.Ed. 422 (1947),
rehearing denied 330 U.S. 853, 67 S. Ct. 673,
91 L.Ed. 1295 6

Superior Oil Co. v. Federal Power Comm.,
322 F.2d 601 (C.A. Tex. 1963), cert. denied
377 U.S. 922, 84 S. Ct. 1219, 12 L.Ed 215,
rehearing denied 377 U.S. 960, 84 S. Ct. 1625,
12 L.Ed.2d 504 (1964) 4

U.S. ex rel. Knauff v. Watkins,
173 F.2d 599 (C.A. N.Y. 1949), aff'd 338 U.S. 537,
70 S. Ct. 309, 94 L.Ed. 317 (1950) 4

UNITED STATES CONSTITUTION CITED:

Amendment XIV 3, 6, 8, 9

TABLE OF CONTENTS

Page

STATUTES CITED:

N.J.S. 27:12B-4 3

N.J.S. 27:12B-5(j) 3

N.J.S. 27:12B-18(g) 3

APPENDIX

N.J.S. 27:12B-4 ..... 1a

N.J.S. 27:12B-5(j) 3a

N.J.S. 27:12B-18(g) 3a

STATEMENT OF THE CASE

Appellees-respondents concur with that portion of Petitioner's Statement of the Case regarding the proceeding of the complaint filed in the New Jersey courts and its disposition. However, with regard to the investigation conducted by the New Jersey Highway Authority, appellees-respondents add the following:

On September 14, 1960 the chairman of the Traffic Safety Committee of the Garden State Parkway advised the Parkway's executive director that the Committee recommended that a study be made of the effect of motorcycle traffic on Parkway safety. The recommendation was based upon the Committee members' observation to traffic over several years, and also on the fact that two fatal accidents involving motorcycles constituted almost eight per cent of total Parkway fatalities over a fourteen month period.

On October 13, 1960, the Parkway Traffic Engineer filed with the Operations Manager of the Parkway a memorandum concerning the history of motorcycle operation on the Parkway.

On December 29, 1960 the Executive Director of the Parkway received a further analysis from Parsons, Brinckerhoff, Quade & Douglas, Engineers.

Based upon these reports and the recommendations of the Traffic Safety Committee, as well as the respective individual experience and expertise of the members of the New Jersey Highway Authority, a Resolution was adopted on January 5, 1961, which prohibited the use of the Parkway by motorcycles.

Based upon the within challenge to the continuing validity of the said Resolution, the Parkway had Edwards

and Kelcey, Inc., an engineering consultant, undertake an extensive investigation into the present relationship of motorcycles to other vehicles on controlled-access highways. The resulting report entitled "Motorcycle Operation and Safety, The Garden State Parkway" was submitted to the Executive Director of the Parkway in October 1972.

On October 26, 1972, having considered the findings of Edwards and Kelcey, Inc., the New Jersey Highway Authority determined that "the motorcycle is incompatible with the other vehicles using the Parkway and that increased safety would be attained by a more homogenous traffic stream from which motorcycles, as a completely different vehicle type, should be eliminated." The Authority reaffirmed their resolution prohibiting motorcycle traffic on the Parkway.

REASONS FOR DENYING THE WRIT

POINT I

The New Jersey Highway Authority regulation under attack is a valid exercise of that body's administrative powers and complies with the due process requirements of the Fourteenth Amendment of the United States Constitution.

The New Jersey Highway Authority was created by *N.J.S.* 27:12B-4 in 1952. The Authority, a body corporate and politic, was endowed with the power "to establish and enforce rules and regulations for the use of any project." *N.J.S.* 27:12B-5(j). In accordance with other sections of the New Jersey Highway Authority Act, the Authority is authorized and empowered by *N.J.S.* 27:12B-18(g) to adopt regulations "concerning types, weights and sizes of vehicles permitted to use such project, . . . together with any and all regulations adopted by the Authority to control traffic and prohibit acts hazardous in their nature or tending to impede or block the normal and reasonable flow of traffic upon such project;" provided certain predesignated steps are followed.

Pursuant to its statutory authority, and as a result of the sequence of events set forth above, the Authority determined that it was necessary and desirable to prohibit motorcycle traffic from the Garden State Parkway. A resolution to that effect was adopted on January 5, 1961.

Administrative orders are presumed to be valid. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 69 S. Ct. 968, 93 L.Ed. 1231 (1949). When a legislative action is challenged as arbitrary, the challenge must fail if any state of facts reasonably can be conceived in support of the enactment,

and a court of law will presume the existence of these facts unless the challenger can show the contrary. *Pacific States Box and Basket Co. v. White*, 296 U.S. 176, 59 S. Ct. 159, 80 L.Ed. 138 (1935). Therefore, the burden of showing that the regulation of the New Jersey Highway Authority is invalid is on the plaintiffs. This burden is only carried by showing as a minimum that the regulation is inconsistant with the underlying statute, or is unreasonable or inappropriate. *U.S. ex rel. Knauff v. Watkins*, 173 F.2d 599 (C.A. N.Y. 1949); *aff'd* 338 U.S. 537, 70 S. Ct. 309, 94 L.Ed. 317 (1950).

There can be little doubt as to the validity of such a regulation as we have here. The Highway Authority responded to a situation which threatened the lives and safety of those who used the Garden State Parkway, and on January 5, 1961, enacted a regulation, in accordance with its statutory authority, banning motorcycles from the Parkway. The Authority in doing so relied both on its own expertise and on the results of several reports, all of which pointed to the fact that motorcycles constituted a great hazard both to their operators and to other motorists when used in traffic situations commonly found on the Parkway.

Petitioners, however, contend that the Authority acted arbitarily and unreasonably and without due process in enacting the regulation. Their claim, totally unsupported, is that they were denied an opportunity to be heard when the Authority was conducting its study in 1960. In legislation or rule-making, there is no constitutional right to a hearing. *Superior Oil Co. v. Federal Power Commission*, 322 F.2d 601 (C.A. Tex. 1963), *cert. den'd* 377 U.S. 922, 84 S. Ct. 1219, 12 L.Ed. 215, *rehearing den'd* 377 U.S. 960, 84 S. Ct. 1625, 12 L.Ed.2d 504 (1964). Where a rule of conduct applies to more than a few people, it is

impracticable that everyone should have a direct voice in its adoption. *Bi-Metallic Investment Co. v. State Board*, 239 U.S. 441, 36 S. Ct. 141, 60 L.Ed. 372 (1915).

The Authority, of course, realized it would be impractical to invite all motorcyclists to present their views on the proposed resolution. Therefore, it held a special meeting on December 23, 1960, at which time the American Motorcycle Association was to deliver a presentation concerning a study on motorcycle safety. The Association is recognized as a voice of motorcycling interests, and the Authority felt they might have information directly related to the study being conducted. However, the Association failed to appear and failed to submit any type of written presentation. Although the Association was again invited to submit its presentation, it failed to do so. An opportunity to be heard had clearly been afforded, but not taken advantage of.

Petitioners have insinuated, without any support for such a contention, that the Authority conducted a new study of the matter in 1972 since it realized that the 1960 study and resolution was arbitrary and unreasonable and that it needed support for the position it had taken. However, by ordering a new study in 1972, the Authority clearly demonstrated its good faith and a determination to enact and enforce regulations only where there is a reasonable relation to the ends to be achieved; in this case, Parkway safety. In 1972, the regulation in question was under attack by the Petitioners who had brought suit contesting its validity in the state courts. The Authority recognized the increased use of motorcycles in the past 12 years and the possibilty that some evidence might exist which would justify some relaxation of its regulation. The Authority, therefore, ordered a new study, not to buttress an already pre-determined position as Petitioners contend, but to

avoid the expense of further litigation to defend a regulation which, although validly enacted, could be in need of revision if new evidence were shown. However, instead of citing a need for revision, the 1972 study demonstrated clearly that the same factors which existed in 1960 were still in evidence: motorcycles are incompatible with the type of vehicles and traffic encountered on the Garden State Parkway.

After considering the 1972 study, the Authority felt that regulation was still sound and that no need existed to conduct hearings for a new regulation. The actions of the Authority here did not constitute a rule making procedure which entitled this Petitioners to an opportunity to be heard. That opportunity was indeed offered to representatives of the motorcycling public in 1960 when the Authority was conducting its rule making proceedings. The New Jersey Highway Authority, under the circumstances, has in no way denied Petitioners their right to due process under the Fourteenth Amendment of the United States Constitution.

Point II

The New Jersey Highway Authority's regulation banning motorcycle operation on the Garden State Parkway complies with the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Equal protection means that all persons subjected to state legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and in liabilities imposed. *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L.Ed. 422 (1947), *rehearing den'd*, 330 U.S. 853, 67 S. Ct. 673, 91 L.Ed. 1295. Equal protection does not require that all persons

be dealt with identically, but it does require that the distinction made have some relevance to the purpose for which the classification is made. *Baxstrom v. Herold*, 383 U.S. 107, 86 S. Ct. 760, 15 L.Ed.2d 620 (1966). The job of setting a particular classification is primarily for the legislature. Judicial inquiry is concerned only with the question of whether it is so lacking in any reasonable basis as to be arbitrary. *Borden's Farm Products Co. v. Ten Eyck*, 297 U.S. 251, 56 S. Ct. 453, 80 L.Ed. 669 (1936). Furthermore, a classification will not be interfered with by the courts unless it is clearly, manifestly, palpably and purely arbitrary and unreasonable. *Radice v. People of State of New York*, 264 U.S. 292, 44 S. Ct. 325, 68 L.Ed. 690 (1924). Therefore, the question presented is whether there is any rational relation between the protection of the health and safety of Parkway users and the proscription of motorcycles on that roadway. The existence of this relationship is evidenced by the reports and investigations which preceded the 1961 resolution, and is further supported by the engineering study when the 1961 resolution came under attack.

Petitioners contend that there is no factual or legal basis to treat motorcycles differently than automobiles in their use of the Garden State Parkway. However, the studies done in 1960 and 1962 clearly show the reasonableness of placing motorcycles in a different class. The evidence showed that motorcycles were involved in a disproportionate share of accidents and that this was the direct result of the design and limitations of the motorcycle itself. Furthermore, Petitioners have failed throughout the various stages of this litigation to produce any evidence of a credible nature which would tend to dispute the reasonableness of the regulation.

Petitioners further contend this evidence is insufficient to support the Authority's regulation. In the case of

Sproles v. Binford, 286 U.S. 374, 52 S. Ct. 581, 76 L.Ed. 1167 (1931), the court said:

> "To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."
>
> "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." 286 U.S. at 388-89.

That case involved a statute limiting the net load of trucks which would be permitted to operate on the state highways, and the Court upheld the statute as complying with the requirements of equal protection.

A similar case, *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 58 S. Ct. 510, 82 L.Ed. 734 (1938), reached the federal Supreme Court several years later. In this case South Carolina imposed restrictions on the use of its highways by certain types of trucks. Again the regulation was upheld:

> "And in reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state Legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to chose that one which in its opinion is best adapted to all the diverse interests involved." 303 U.S. at 190.

The court further found that only if the legislative choice is without rational basis may it be invalidated. 303 U.S. at 192.

A New York City traffic regulation prohibiting the operation on any street of an advertising vehicle unless that vehicle is engaged in the usual business of its owner and not mainly for advertising, was attacked as violating the Equal Protection clause in *Railway Express, Inc. v. State of New York,* 336 U.S. 106, 69 S. Ct. 463, 93 L.Ed. 533 (1949). The challenger's contentions were dismissed by the Court:

> "We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City." 336 U.S. at 109.

It is, therefore, the Appellees-Respondents' contention, as well supported by the cases cited, that the Authority has the legislative power to decide whether or not the regulation enacted is best suited to correcting the hazardous conditions presented by the presence of motorcycles on the Parkway. The various reports contained in both the 1960 and 1972 studies more than demonstrate a reasonable relation between the restriction imposed and the ends to be accomplished. The New Jersey courts have already recognized that motorcycles present different safety hazards than other vehicles, and that governmental actions aimed at protecting other users of the highways, as well as the motorcyclists themselves, bear a real and substantial relationship to highway safety in general. *State v. Krammes,* 105 N.J. Super. 345 (App. Div. 1969); *State v. Mele,* 103 N.J. Super. 353 (Cty. Ct. 1968). It is precisely these safety hazards, as set forth in the two studies, that led the Authority to enact the regulation under attack. The Petitioners, although they may on occasion be inconvenienced, have in no way been deprived of their rights to equal protection under the Fourteenth Amendment. The United States Supreme Court, by denying the writ of certiorari,

will not only be upholding the right of the Highway Authority to act where there is a reasonable relationship to the protection of the health and safety of Parkway users, but will rightfully be rejecting the contentions of the Petitioners which have been based not on fact, but on mere opinions and speculation. Such opinions and speculation, as recognized by the courts below, are insufficient to overcome the showing of reasonableness which the Respondents have presented throughout this case.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

/s/ William T. Hiering
WILLIAM T. HIERING
Attorney for the Respondents

APPENDIX

Respondents concur in the items presented by Petitioners on pages 1a through 6a of Petitioners' Appendix but wish to add in addition thereto the following:

N.J.S. 27:12B-4—There is hereby established in the State Highway Department a body corporate and politic, with corporate succession, to be known as the "New Jersey Highway Authority." The authority is hereby constituted an instrumentality exercising public and essential governmental functions, and the exercise by the authority of the powers conferred by this act in the construction, operation and maintenance of projects shall be deemed and held to be an essential governmental function of the State.

The New Jersey Highway Authority shall consist of five members, each of whom shall be a resident of the State, who shall have been a qualified elector therein for a period of at least 1 year next preceding his appointment. Each member of the authority shall be appointed by the Governor, with the advice and consent of the Senate, for a term of 5 years and shall serve until his successor is appointed and has qualified; except that of the first appointments hereunder, one shall be for a term of 3 years and one for a term of 6 years, and they shall serve until their respective successors are appointed and have qualified. The term of each of the first appointees hereunder shall be designated by the Governor. Each member of the authority may be removed from office by the Governor, for cause, after a public hearing. Each member of the authority before entering upon his duties shall take and subscribe an oath to perform the duties of his office faithfully, impartially and justly to the best of his ability. A record of such oaths shall be filed in the office of the Secretary of State.

Any vacancies in the membership of the authority occurring other than by expiration of term shall be filed in the same manner as the original appointed, but for the unexpired term only.

The Governor shall designate one of the members of the authority as chairman thereof and another member as vice-chairman thereof. The chairman and vice-chairman of the authority so designated shall serve as such at the pleasure of the Governor and until their respective successors have been designated. The authority shall elect a secretary and a treasurer who need not be members. At the option of the authority the same person may be elected to serve both as secretary and treasurer. Three members of the authority shall constitute a quorum and the vote of three members shall be necessary for any action taken by the authority. No vacancy in the membership of the authority shall impair the right of a quorum to exercise all the rights and perform all the duties of the authority.

Before the issuance of any bonds or notes under the provisions of this act, each member of the authority shall execute a surety bond in the penal sum of $25,000.00, and the treasurer shall execute a surety bond in the penal sum of $50,000,00, each such surety bond to be conditioned upon the faithful performance of the duties of the office of such member or treasurer, as the case may be, to be executed by a surety company authorized to transact business in the State of New Jersey as surety and to be approved by the Attorney General and filed in the office of the Secretary of State.

The members of the authority shall not receive compensation for their services as members of the authority. Each member shall be reimbursed by the authority for his actual expenses necessarily incurred in the performance of his duties.

N.J.S. 27:12B-5(j)—The Authority shall be a body corporate and politic and shall have perpetual succession and shall have the following powers:

(j) To establish and enforce rules and regulations for the use of any project.

N.J.S. 27:12B-18(g)—All persons operating vehicles upon any project, or seeking to do so, must at all times comply with regulations, not inconsistent with the other sections of this act, adopted by the Authority concerning types, weights and sizes of vehicles permitted to use such project, and with regulations adopted by the Authority for or prohibiting the parking of vehicles, concerning the making of turns and the use of particular traffic lanes, together with any and all other regulations adopted by the Authority to control traffic and prohibit acts hazardous in their nature or tending to impede or block the normal and reasonable flow of traffic upon such project; provided, however, that prior to the adoption of any regulations for the control of traffic on any such project, including the designation of any speed limits, the Authority shall investigate and consider the need for and desirability of such regulation for the safety of persons and property, including the Authority's property, and the contribution which any such regulation would make toward the efficient and safe handling of traffic and use of such project, and shall determine that such regulation is necessary or desirable to accomplish such purposes or one or some of them, and that upon or prior to the effective date of any such regulation and during its continuance, notice thereof shall be given to the drivers of vehicles by appropriate signs erected at the roadside or otherwise posted. The Authority is hereby authorized and empowered to make, adopt and promulgate regulations referred to in this section in accordance with the provisions hereof. Regulations adopted by the Authority

pursuant to the provisions of this section shall insofar as practicable, having due regard to the features of the project and the characteristics of traffic thereon, be consistent with the provisions of Title 39 of the Revised Statutes applicable to similar subjects. The Authority shall have power to amend, supplement or repeal any regulation adopted by it under the provisions of this section. No regulation and no amendment or supplement thereto or repealer thereof adopted by the Authority shall take effect until it is filed with the Secretary of State, by the filing of a copy thereof certified by the secretary of the Authority.